Supreme Court, U.S.
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No. 02-1129

In The

Supreme Court of the United States

ROBERT CUNNINGHAM,

Petitioner,

vs.

DARYL GATES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROCKARD J. DELGADILLO,
City Attorney
AMY JO FIELD,
Deputy City Attorney
Counsel of Record
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-8637

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This Petition presents the following question – a question far narrower than the question Petitioner frames:

> *Heck v. Humphrey*, 512 U.S. 477 (1994), requires that a 42 U.S.C. § 1983 claimant obtain federal habeas relief from the underlying criminal conviction before filing his or her civil rights suit. Robert Cunningham – serving time on a murder conviction that gives rise to this section 1983 lawsuit – admits he had well over a year to pursue habeas relief but made the "voluntary choice not to seek habeas relief." (Petition, p. 3.) Can a civil rights claimant circumvent Heck's habeas requirement by letting the habeas deadline pass and then claim the requirement has become legally impossible to meet?

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SUMMARY OF THE ARGUMENT

There is no compelling reason to grant this Petition for Writ of Certiorari. The portion of the decision Petitioner challenges – the Ninth Circuit's refusal to allow Robert Cunningham to take his § 1983 cause of action otherwise barred by *Heck v. Humphrey*, 512 U.S. 477, outside its scope by opting not to timely pursue his available federal habeas corpus remedy – does not run afoul of the *Heck* decision, nor does it conflict with any decision of any other circuit court of appeal. The issue is well-settled. At the crossroads of the federal habeas statutes and 42 U.S.C. § 1983, a prisoner cannot avoid the habeas statute's exhaustion requirement by choosing not to pursue his habeas rights and proceeding directly with a § 1983 suit. *Heck v. Humphrey*, 512 U.S. at 498 (Souter, J. concurring). Until the prisoner can demonstrate that his conviction has been invalidated, his § 1983 claim is not cognizable. *Id.* at 490. Because the Ninth Circuit's decision is consistent with the relevant decisions of this Court and the circuit courts of appeal, the petition should be denied.

STATEMENT OF THE CASE

1. The State Court Criminal Proceedings

On June 26, 1995, Cunningham and Daniel Soly committed an armed robbery at a liquor store. As they attempted to flee, Los Angeles Police Department officers apprehended them. There was a shoot-out between the suspects and the officers. During the shoot-out, Cunningham shot and injured two of the officers; the officers shot and killed Soly; and the officers shot and seriously injured Cunningham.

Cunningham was charged in state court with the burglary and robbery of the liquor store, the murder of Soly, the attempted murder of the two injured officers, and conspiracy to commit robbery with Soly as his co-conspirator. On December 17, 1996, the jury convicted Cunningham on all charges. Cunningham appealed to the California Court of Appeal and the court affirmed his conviction. His conviction became final on January 25, 2000, when the California Supreme Court denied his petition for direct review. Cunningham had until April 24, 2001, to file a petition for writ of habeas corpus in the federal court – but elected not to – letting the deadline pass.

2. The 42 U.S.C. § 1983 Claims

Meanwhile, on April 15, 1996, with the state court criminal charges still pending, Cunningham filed a 42 U.S.C. § 1983 complaint alleging excessive force against the individual officers involved, the former chief of the Los Angeles Police Department, and various other government officials including the Mayor, members of the Los Angeles City Council, attorneys with the Office of the Los Angeles City Attorney, and members of the Los Angeles Board of Police Commissioners.

In March 2001, defendants sought summary judgment, arguing Cunningham's claims were barred by the *Heck* rule. On July 2, 2001 – with the state court criminal conviction now final and the deadline for seeking federal habeas relief long past – the district court held the claims were barred by *Heck* and granted the motion. The court found that because the facts Cunningham claimed were in dispute – whether the officers shot first, whether Soly was

shot without provocation, whether Cunningham posed a threat to the officers when Soly was shot, whether Cunningham only shot back in self-defense, whether Soly was already dead when Cunningham shot, and whether Cunningham and Soly conspired to rob the liquor store – were all factual disputes that if resolved in Cunningham's favor would undermine the validity of his criminal convictions. Thus, his claims fell squarely within the rule set forth in *Heck v. Humphrey.* (Petition, Appendix B.)

Rejecting Cunningham's suggestion that his failure to timely pursue habeas relief took his claim out of Heck's purview, the Ninth Circuit affirmed. (Petition, Appendix A, p. 11, fn. 3.) Cunningham filed a petition for rehearing which the Ninth Circuit denied. (Petition, Appendix A.)

REASONS TO DENY THE WRIT

1. A Claim That The Court Misapplied *Heck v. Humphrey* Is Not A Ground For Granting Certiorari

Heck v. Humphrey, 512 U.S. at 487, held that if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which § 1983 damages are sought, the § 1983 action must be dismissed. Cunningham does not challenge the Ninth Circuit's determination that his § 1983 claims "are barred under *Heck* because they would necessarily imply the invalidity of his state convictions for felony murder and attempted murder." *Cunningham v. Gates,* 312 F.3d 1148 (9th Cir. 2002), *amended* 2003 LEXIS 498 (9th Cir. 2003). Instead, in pressing this Court to grant his petition, Cunningham argues *Heck* ceased to apply after

he voluntarily let the federal habeas deadline pass. (Petition, p. 5.)

Rule 10 of the Supreme Court Rules clearly cautions: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, Cunningham's claim that the Ninth Circuit erroneously applied the rule of *Heck* is not grounds for granting certiorari.

2. The Ninth Circuit's Decision That A § 1983 Claimant Cannot Escape The Rule of *Heck* By Opting Not To Pursue Federal Habeas Relief Does Not Conflict With The Relevant Decisions Of This Court

Cunningham also urges this Court to grant his writ on the ground that the Ninth Circuit's refusal to find *Heck* inapplicable once habeas relief becomes legally unobtainable conflicts with the *Heck* decision. (Petition, pp. 5-10.) Cunningham argues:

> [T]he only stated purpose of *Heck* is to prevent, at the intersection of federal *habeas corpus* and section 1983, a collision between the two. Here because it would be impossible, as a matter of law, for there to be a collision, there is no legitimate reason for the rule in this case. (Petition, p. 9.)

Cunningham tries to bolster his argument with Justice Souter's concurring opinion in *Spencer v. Kemna*, 523 U.S. 1, 21 (1999), where he stated that a § 1983 claimant is not bound to satisfy *Heck's* favorable termination requirement if satisfaction would be impossible as a matter of law. (Petition,

pp. 7-8.) But the Ninth Circuit's decision in *Cunningham v. Gates* tracks well both *Heck's* rationale and Justice Souter's concurrence in *Spencer*.

A. *Cunningham v. Gates* does not conflict with *Heck*

Heck dictates the proper route to federal court that a prisoner claiming unconstitutional treatment at the hands of a state official must follow when § 1983 relief and federal habeas relief are both available. *Heck* sought to reconcile the two statutes because both 42 U.S.C. § 1983 and the habeas statute provide access to a federal forum for such claims, but the federal habeas statute requires state prisoners to first seek redress in the state court, where exhaustion of state remedies is not a prerequisite to a § 1983 action.

Heck's reconciliation could not have been clearer: When standing at the intersection of § 1983 and federal habeas, a prisoner cannot avoid the habeas statute's exhaustion requirement by choosing the § 1983 route to federal court. "[A]llowing a state prisoner to proceed directly with a federal-court § 1983 attack on his conviction or sentence 'would wholly frustrate explicit congressional intent' as declared in the federal habeas exhaustion requirement, . . . ". *Heck v. Humphrey*, 512 U.S. at 498, (Souter, J., concurring) quoting *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

According to *Heck*, the same holds true for the prisoner seeking federal-court § 1983 damages for unconstitutional conviction or confinement: "[A] state court prisoner challenging the lawfulness of his confinement [is required] to follow habeas's rule before seeking § 1983 damages in

federal court, . . . ". *Id.* Until the prisoner can demonstrate that his conviction or sentence has been invalidated, his § 1983 cause of action for damages is not cognizable. *Id.* at 490. In fact *Heck* states,

> Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. *Id.* at 489.

Heck's rule forces prisoners "to follow the federal habeas route with claims that fall within the plain language of § 1983 when that is necessary to prevent a requirement of the habeas statute from being undermined." *Id.* at 501 (Souter, J., concurring).

Consistent with *Heck*, the Ninth Circuit refused to allow Cunningham to purposefully create a roadblock in the readily-available federal habeas road so that he could detour down the § 1983 road to federal court.

B. *Cunningham v. Gates* aligns with *Spencer v. Kemna*

But Cunningham argues that even if the Ninth Circuit's decision in *Cunningham v. Gates* does not conflict with *Heck*, "*Spencer* completely disposes of the issue of whether one who was convicted of a crime and who no longer is able to apply for habeas relief may be barred from bringing a section 1983 action by *Heck's* accrual rule." (Petition, p. 7.) The language Cunningham relies on is not only pure dicta but must be read in light of *Spencer's* facts – facts which are completely distinguishable from those at hand.

In *Spencer*, plaintiff diligently pursued his criminal appellate remedies all the way to the state's highest court in seeking to invalidate an order revoking his parole. Some six months before his three-year sentence expired, he filed his petition for writ of habeas corpus in the United States district court. However, before the district court ruled, his imprisonment expired, thereby mooting the petition.

It was on this factual backdrop that Justice Souter stated, "*Heck* did not hold that a released prisoner *in Spencer's circumstances* is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result." *Id.* at 19, *emphasis added.* Justice Souter was concerned with denying a potential section 1983 litigant access to the federal court by imposing the favorable termination requirement of *Heck* that "would be impossible as a matter of law for him to satisfy." *Id.* at 21, *emphasis added.*

Justice Souter's focus in *Spencer v. Kemna*, just as it was in his *Heck* concurrence, was the individual who was no longer in custody and therefore did not have a habeas remedy. He gave as examples in his concurrence in *Heck*, "people who are merely fined" or "who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Heck v. Humphrey*, 512 U.S. at 500 (Souter, J., concurring.)

Also in Justice Ginsberg's concurrence in *Spencer,* she again emphasizes the unfairness of denying § 1983 access to "individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) . . . ,"

Spencer v. Kemna, 523 U.S. at 21 (Ginsberg, J., concurring.)

In contrast, Cunningham had a federal habeas right – he simply chose not to pursue it. Some nine months after Cunningham filed his § 1983 lawsuit, he was convicted of the first degree murder of Soly on December 17, 1996. He had one-year plus 90 days from the date his convictions became final to file his federal petition for writ of habeas corpus. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

Cunningham's convictions became final on January 25, 2000, when the California Supreme Court denied Cunningham's petition for direct review. Cunningham therefore had until April 24, 2001, to file his federal habeas petition. Thus, it was not "impossible as a matter of law" for Cunningham to satisfy *Heck's* favorable termination requirement. It was incumbent on him to pursue his habeas remedies prior to bringing his § 1983 claim. The Ninth Circuit correctly rejected Cunningham's argument that his self-described "voluntary choice not to seek habeas relief" (Petition, p. 3) is not "akin to those who are 'not in custody'" (*Cunningham*, 312 F.3d at 1154, fn. 3) and therefore the *Spencer* concurrence has no application here.

3. *Cunningham*, With Its Unique Set Of Facts, Is Not In Conflict With The Decision Of Any Other United States Court Of Appeal Decision

Cunningham also argues that his Petition should be granted because the Ninth Circuit's *Heck* ruling conflicts with the Seventh Circuit's decision in *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999) and the Second Circuit's decision in *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999). Cunningham

claims these cases and other district court cases decided since *Spencer v. Kemna* have followed or adopted the reasoning in Justice Souter's concurring opinion. (Petition, pp. 10-11.) But *Carr* and *Jenkins* involve the completely different issue of *Heck's* application to challenges to the terms of confinement.

In *Jenkins v. Haubert*, 179 F.3d 19, the Second Circuit discussed Justice Souter's concurring opinion, but made clear its conclusion did not rest "solely on our tally of votes on the Court for Justice Souter's view of *Heck*." *Id.* at 27. Instead, "[b]ecause we find that Jenkins's suit is properly characterized as a challenge to the conditions of his confinement, rather than as a challenge to the fact or duration of his confinement, *Heck's* favorable termination requirement does not apply." *Id.*

The Seventh Circuit case, *Carr v. O'Leary*, 167 F.3d 1124, also involved a prisoner challenge under § 1983 to a term of disciplinary segregation, not the duration or fact of his confinement. And like Spencer, Carr had no realistic opportunity to petition for habeas relief. The additional time he was required to serve because of the disciplinary sanction was so short that even if he had sought habeas corpus before his release, his imminent release would have mooted the proceedings. *Id.* at 1127.

Thus, the Ninth Circuit's decision in *Cunningham v. Gates* is not in conflict with the decisions from other circuits. Nor is there any authority for Cunningham's position that he can escape *Heck's* favorable termination requirement by opting not pursue his federal habeas remedy.

4. Cunningham's Prisoner Status Did Not Prevent His § 1983 Claims: The Ninth Circuit's Proper Application Of The Rule Of *Heck* Barred His Claims

Cunningham's final argument is that the Ninth Circuit's decision that *Heck* barred his § 1983 claims created the "unintended anomaly" or "unintended result" of leaving persons like him who, because of the mere fact that they "are in custody, but have not and no longer can seek habeas relief," without access to the federal court. (See Petition, pp. 11-12.) But the position Cunningham finds himself in does not turn on his status as a prisoner; it is not an anomaly; and it is precisely the intended result of *Heck*.

The intended result of *Heck* was to prevent a prisoner with two potential avenues of relief in the federal court – § 1983 and federal habeas – from bypassing the exhaustion requirements of the federal habeas statute by pursuing his claims via a § 1983 action. *Heck* made clear that even when a prisoner had exhausted his state court appellate remedies, his access to federal court must be had by way of federal habeas. Cunningham had the opportunity to pursue federal habeas relief but chose not to, instead attempting to take the exact path that *Heck* ruled was not yet available to him. Thus, the Ninth Circuit's decision in *Cunningham v. Gates* is consistent with the *Heck* decision.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Dated: March, 2003

Respectfully submitted,

ROCKARD J. DELGADILLO,
City Attorney
AMY JO FIELD,
Deputy City Attorney
Counsel of Record
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-8637

Attorneys for Respondents